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KAMARI KASAN

v.

MALAYSIAN MARITIME ACADEMY SDN BHD

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HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD ARIFF YUSOF J
[ORIGINATING MOTION NO: R3-25-183-2009]
30 DECEMBER 2009

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LABOUR LAW: *Industrial Court - Award - Judicial review - Application for - Claim for back wages and reinstatement - Award based on basic salary instead of total last drawn salary - Whether award quashed - Whether Industrial Court committed an error of law in limiting back wages up to 24 months last drawn salary - Reinstatement not allowed - Whether jurisdictional error*

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ADMINISTRATIVE LAW: *Judicial review - Certiorari - Application to quash award of Industrial Court - Claim for back wages and reinstatement - Factors to consider - Whether allowed*

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This was the applicant's application by way of judicial review to quash the Industrial Court's order dated 24 April 2009 ('the Award') based on his claim for constructive dismissal. The Industrial Court awarded the applicant with a sum of RM82,275 as back wages and compensation in lieu of reinstatement on the basis of 24 months last drawn salary. The calculation was made based on the applicant's basic salary of RM2,867

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instead of RM4,232.40 which was the total sum of his last drawn salary, *ie*, basic salary plus contractual allowances as agreed between the parties. In this application, the applicant was claiming close to RM1,000,000 as back wages plus reinstatement. Further, there was an interval of 17 years between the date of his constructive dismissal and the award.

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The applicant submitted that it was open to the High Court in *certiorari* proceedings to interfere with the quantum of compensation awarded by the Industrial Court and to award full back wages calculated from the date of dismissal instead of limiting the compensation to 24 months. In light of this, the applicant referred to the case of *Josephine Banun Pako v. Hong Leong Bank Bhd* ('Josephine Banun') wherein the court held that

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the claimant was entitled to back wages from the date of dismissal to the date of hearing. Thus, it was the applicant's contention that he should be awarded with full back wages as he had not been gainfully employed since his dismissal and the delay in disposal of the case was not his fault.

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Held (quashing Industrial Court's award in relation to quantum of back wages; disallowing application for reinstatement):

(1) There was a jurisdictional error in relation to the quantum wherein it was apparent on the record before the Industrial Court that the applicant's last drawn salary was RM4,232.40. The applicant was therefore entitled to have his award of back wages for 24 months and compensation in lieu to be calculated on a higher basis. There were no convincing grounds to depart from the usual rule that the court should only award back wages for up to 24 months last drawn salary. (paras 5 & 14)

(2) The court maintained the award in relation to the refusal for reinstatement since this was not a proper case to so order. Applying the normal principles of judicial review, the court was not persuaded that there was any jurisdictional error in relation to the said finding. (paras 5, 12, 14 & 16)

(3) A distinction was drawn with the case of Josephine Banun wherein the court in that case found that the applicant was an honest employee who had diligently served the employer for a decade and had been falsely accused for misappropriation of money. The award in that case reflected the contemptuous conduct of the employer for which the court decided to award back wages on a restitutionary basis. It would not be just and equitable to apply the same reasoning against the respondent on the special facts and circumstances of this case. Further, the delay of 17 years could not be wholly attributable to the respondent. (paras 6 & 16)

[The respondent was ordered to pay costs of RM2,500 to the applicant.]

Case(s) referred to:

Josephine Banun Pako v. Hong Leong Bank Bhd [2008] 7 CLJ 699 HC ***(dist)***

Pelangi Enterprises Sdn Bhd v. Oh Swee Choo & Anor [2004] 6 CLJ 157 HC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

For the appellant - JB Reuben Netto; M/s Netto & Co
For the respondent - HC Yong; M/s Zaid Ibrahim & Co

Reported by Kumitha Abdul Majid

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JUDGMENT

Mohamad Ariff Yusof J:

Introduction - Nature of Application

B **[1]** This was an application where the applicant, who had claimed constructive dismissal, applied to this court by way of judicial review for a prayer that the order of the Industrial Court dated 24 April 2009 (the "third award") be quashed by an order of *certiorari*, and further, for additional prayers that the applicant be awarded as consequential relief
C backwages of RM927,728.44 with costs, and reinstatement of the applicant. The consequential relief prayed for was on the basis of avoidance of further delay and based on principles of equity, and good conscience and the substantial merits of the case.

The Third Award

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[2] The Industrial Court, in the third award, had ordered the sum of RM82,275 as backwages and compensation *in lieu* of reinstatement of the usual basis of 24 months last-drawn salary for backwages, and last-drawn salary for every year of service (the applicant was employed for
E four years prior to dismissal). In this judicial review application, the applicant was claiming close to RM1,000,000 as backwages plus reinstatement. It has to be noted that this was a case of constructive dismissal, where the applicant was dismissed by the respondent, the Malaysian Maritime Academy Sdn Bhd, on 15 November 1992. There
F was therefore an interval of 17 years between the date of his constructive dismissal and the third award.

The Background To The Delay Of 17 Years

[3] The applicant's claim had a chequered procedural history. First,
G the applicant's claim for constructive dismissal was dismissed by the Industrial Court on 20 September 1988 by Award No. 509/98 (the first award). He applied for judicial review, which turned out to be successful and the court granted *certiorari* but did not grant ancillary relief of *mandamus*. The evidence disclosed the applicant did not pray for an order of *mandamus*. Such being so, the respondent refused to reinstate
H him. The second claim in the Industrial Court was filed *vide* Case No. 3/4-502/01. In Award No. 162/2003 (the second award) the Industrial Court again rejected the applicant's claim for compensation and further relief on the ground of lack of jurisdiction. It appeared that the court declined to entertain the claim because there was no order from
I the High Court declaring it to do anything specific. Judicial review was again sought, and again dismissed on 4 April 2005. The applicant then appealed to the Court of Appeal which allowed the appeal on

3 November 2005. The Court of Appeal ordered that the Industrial Court hear the parties on the remedy to be granted. This then led to another hearing in the Industrial Court and the handing down of the third award, and the present judicial review proceedings.

Application Of *R Rama Chandran*

[4] I agreed with the applicant's argument that given the delay of the 17 years, this court could and should assess compensation, as prayed by the applicant in this judicial review application, without having to remit this case back to the Industrial Court. The applicant made the obvious reference to the Federal Court decision in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147.

[5] I quashed the award on the basis of error of law since the Industrial Court Chairman had based his award on the basic salary of RM2,867 instead of RM4,232.40 which was the sum total of his last-drawn salary (basic salary plus contractual allowances as agreed between the parties), but did not accede totally to the other consequential prayers, since I did not find any convincing grounds to depart from the usual rule that the court should only award backwages for up to 24 months last-drawn salary. Further, I disallowed the prayer for reinstatement since it was obvious to me that this was not a proper case to so order.

Award Of Full Backwages: *Josephine Banun*

[6] I did not believe the delay of 17 years could be wholly attributed to the respondent. Counsel for the applicant submitted extensively on the point that it was open to the High Court in *certiorari* proceedings to interfere with the quantum of compensation awarded by the Industrial Court and to award in proper cases recovery of backwages calculated from the date of dismissal and award full backwages instead of limiting the compensation to 24 months. The attention of this court was especially drawn to the decision of the High Court in *Josephine Banun Pako v. Hong Leong Bank Bhd* [2008] 7 CLJ 699 where the court held that the claimant was entitled to backwages from the date of dismissal to the date of hearing. The learned judicial commissioner in *Josephine Banun* had held:

> The relief of backwages, the following are my observations.
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> - The Claimant is entitled to backwages from the date of dismissal to the date of hearing;
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> - The rationale being the Claimant's will be in full employment was the employer if not for the dismissal, which is found to be unjust, without basis and excuse.

- Practice Note No. 1 of 1987 issued by the Industrial Court, which speaks of "guidelines fordismissal cases", seeks to limit the award of backwages to a period of 24 months. On the effect of the application of the practice direction, I am reminded of the observation made by this Court an Award No. 94 of 2005, *Chung Sen Transportation v. Johnny anak Rinip* ....:

> ... it has to be borne in mind that the practice note is only a guideline as the entitulement suggests and nothing more, thus it serves as a guide to prevent astronomical compensation award being handed down by Industrial Court. The practice direction is intended to be no more than a guideline and cannot be exalted into a rule of law reflecting the true effect of the law relating to remedies available to the dismissed workmen. ...

Applicant's Arguments in Support

[7] Applicant's counsel argued that since it was established the applicant had not been gainfully employed since his dismissal and the delay in disposal of the case was not his fault, this court should award full backwages.

[8] To quote from applicant counsel's submission:

(a) He was employed as a Deputy Registrar (Administration) in the company since 1.4.1988.

(b) His last-drawn salary was RM 4,613.48 - wage slips tendered as evidence.

(c) He was constructively dismissed on 15.11.1992.

(d) He sought reinstatement which the company refused even after being served with the order of *certiorari* on 13.9.1999.

(e) His attempts at seeking alternative employment (the least three job interviews was not fruitful in that he was either too qualified for the post or the employer was unhappy upon learning about his present case when asked about his previous experience. His attempts at giving tuition was irregular, to say the least.

(f) He is now resigned to working on his parents' plantation in Johor Bahru earning a salary of approximately RM20.00 a month. Food and lodging is provided.

(g) He has suffered greatly since losing his job - his wife has left him, he has lost his car and his home was mortgaged to the bank resulting in his children's education being altered drastically. He was also hospitalised at Puteri Specialist Hospital, Johor Bahru.

(h) He did not falter in any way during cross-examination as to the seeking of alternative employment.

(i) He does not have any permanent job now and therefore would like to be reinstated to his former position or its equivalent.

[9] It was argued that the learned chairman of the Industrial Court committed an error of law in limiting the quantum of backwages to 24 months. It was alleged by applicant's counsel that the learned Industrial Court Chairman rejected the applicant's contention for full backwages although there were no special circumstances to provide otherwise. In particular the learned chairman was unduly swayed by the legislative amendment to the Industrial Relations Act which came into effect on 28 February 2008 by which it is now expressly provided that in the event back wages are given, such backwages shall not exceed 24 months backwages from the date of dismissal based on the last-drawn salary of the person who has been dismissed without just cause or excuse. Seeing that the present case was filed on 7 November 1992, it was argued any reference to the legislative amendment has no relevance whatsoever.

Reinstatement

[10] The following were the arguments raised in regard to the prayer for reinstatement.

[11] The chairman erred in law and came to a perverse finding on the evidence by decided against the plea for reinstatement. The chairman erred in law in deciding based on the following reasons:

(a) He felt that the applicant was not diligent enough in seeking alternative employment notwithstanding evidence to the contrary;

(b) The applicant was waiting for a bonanza from the court - an irrelevant consideration at best, or at worst was a clear indication of bias against the applicant;

(c) The applicant's financial woes were partly his own doings which was an irrelevant consideration at best, or at worst a clear indication again of bias against the applicant. The learned chairman failed to consider the conduct of the respondent in deliberately failing to reinstate the applicant notwithstanding service of the earlier High Court order;

(d) The former position of Deputy Registrar (Administration) was no longer in existence and that involves a misinterpretation is less misjudgment of the evidence of COW1;

A (e) The applicant had forgotten his job functions as Deputy Registrar since computerisation and high-technology has been incorporated into its work system, although no such evidence was adduced by COW1, which made this factor an irrelevant consideration;

B (f) He erred in law in failing to appreciate that the burden of proving that the claimant had failed to mitigate loss by seeking alternative employment was on the respondent.

Absence Of Jurisdictional Error, Except On Quantum

C **[12]** All these arguments were marshalled in support to persuade this Court that there was jurisdictional error. Applying the normal principles of judicial review jurisdiction, I was not persuaded there was such jurisdictional error in relation to the finding on reinstatement.

D **[13]** The principles relating to the limits of judicial review jurisdiction are too well-known to require extensive citation. These principles are found even in the case authorities cited by the applicant in advancing his case. To take one example, *Pelangi Enterprises Sdn Bhd v. Oh Swee Choo & Anor* [2004] 6 CLJ 157, where the court held:

E > ... As stated by the Supreme Court in *Malayan Banking Bhd v. Association of Bank Officers, Peninsular Malaysia & Another* [1988] 1 CLJ 276 ... the tasks of fact-finding fall within the jurisdiction of the Industrial Court. What is important for me to consider is whether the findings of the Industrial Court is well supported by evidence adduced in the course of trial and it has not taken irrelevant matters into
F > consideration in making the award. I find that the Industrial Court findings are well supported by evidence and it has not taken irrelevant matters into consideration ...

[14] After considering the third award in detail, I could not fault the findings of the learned Industrial Court Chairman, except on his
G conclusion as regards the quantum of the last-drawn salary. It was apparent on the record before the Industrial Court that the last-drawn salary was RM4,232.40. Further, it was not seriously disputed by the respondent that this was the correct figure. There was therefore a clear error in relation to the quantum which resulted in a jurisdictional error,
H but in regard to the other areas, one cannot fault the conclusions of the Industrial Court Chairman, particularly his assessments on the evidence presented before him. After all, judicial review jurisdiction is not appellate jurisdiction but is founded on jurisdictional error of law or legal perversity as summarised nowadays as the grounds of procedural
I impropriety, illegality and irrationality. A study of the award on pp. 6 to 9, namely the concluding part of the award, will lend support to this conclusion. I quote some relevant parts below:

Some 17 years have elapsed since the Defendant's dismissal on 15th November 1992. In all these years he only give tuition and did some rubber tapping, activities which are poles apart from his work as Deputy Registrar (Administration) while in employment with the Respondent. It is fair to say that by now his job functions such Deputy Registrar will, for all practical purposes, has been all but forgotten. This inadequacy will be compounded by the advances that have meanwhile been made since then in computerisation and high-technology and which the Respondent will, doubtless, have incorporated into its work system. Furthermore the courts sees no reason to reject COW1's testimony that the Claimant's former position of Deputy Registrar (Administration) is no longer in existence and that while the Respondent may have two positions available the Claimant does not have the required qualifications or experience for either of these positions. In these circumstances the court is of the view that reinstatement will not be an appropriate remedy. The court will instead award backwages. The quantum of backwages is very much at the discretion of the court but in excising its discretion the court must do so in accordance with established principles. In keeping with the guidelines set by the Industrial Court practice direction number 1 of 1987 it has been normative to limit damages to 24 months. Parliament, in its wisdom, has since seen fit to endorse this 24 months limit *vide* the Industrial Relations (Amendment) Act 2007 ...

The court does not agree with the Claimant's counsel's submission that it has discretion to depart from this traditional capping and to go beyond 24 months in view of the special circumstances of this case. In any event there are no special circumstances such as would warrant the awarding of more than 24 months backwages. The court grants that the common-law principle of mitigation of losses/damages is not apply to cases that fall to be dealt with under the IRA (see *Thilagavathy a/p Alagan Muthiah v. Meng Sing Glass Sdn Bhd* [1997] 3 MLJ 735) but is of the view that the Claimant should have exercised more diligence is seeking alternative employment rather than applying only three times for jobs in the whole 17 years and apparently waiting for a bonanza from this Court. His financial woes are partly of his own doing and it would be against equity and good conscience to expect the Respondent to make good his financial shortfall over and above the 24 month norm. The court will therefore award backwages limited to 24 months last-drawn salary.

... however since the Claimant was earning pittance from giving tuition and rubber tapping and since he has had to endure a 17 year wait for closure to this unfortunate episode the court exercises its discretion not to make any deduction for his post dismissal earnings.

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Conclusion

[15] In the premises, I allowed the application of judicial review in relation to the quantum of backwages and compensation *in lieu*, but maintained the basis of the award. It was accepted by the parties that the effective last-drawn salary was RM4,232.40. The applicant was therefore entitled to have his award of backwages for 24 months and compensation *in lieu* to be calculated on this higher basis. Cost of RM2,500 was ordered to be paid by the respondent to the applicant.

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[16] I maintained the award in relation to the refusal of reinstatement. As for the argument for full backwages based on the reasoning in *Josephine Banun*, I drew a distinction on the basis that on the facts of this instant case the applicant had claimed constructive dismissal. It was not a case of dismissal for alleged misconduct, as was the case in *Josephine Banun*, where the court found the applicant was an honest employee who had diligently served the employer for a decade who had been wrongfully and falsely accused of misappropriation of money. The award in that case therefore reflected the contemptuous conduct of the employer for which the learned judicial commissioner decided to award backwages on a restitutionary basis. I felt it would not be just and equitable to apply the same reasoning against the respondent on the special facts and circumstances of this present case. The delay of 17 years could not, and should not, be wholly attributed to the respondent.

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